185 (3)

Supreme Court, U.S.
FILED
APR 13 2011
OFFICE OF THE CLERK

No. 10-1125

IN THE
Supreme Court of the United States

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, AND MAUREEN H. PIERCE,

Petitioners,

v.

CITY OF GOLETA,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CALIFORNIA APARTMENT ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS FILED WITH CONSENT OF ALL PARTIES

STEPHEN D. PAHL
Counsel of Record
KAREN K. MCCAY
PAYAL D. MEHTA
PAHL & MCCAY
A PROFESSIONAL LAW CORPORATION
225 W. SANTA CLARA, SUITE 1500
SAN JOSE, CALIFORNIA 95113
SPAHL@PAHL-MCCAY.COM
(408) 286-5100
Counsel for Amicus Curiae

April 13, 2011

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BRIEF OF *AMICUS CURIAE* [1] CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF PETITIONER[2]

INTEREST OF *AMICUS CURIAE*

The California Apartment Association ("CAA") is the largest state-wide rental housing trade association in the country, representing more than 50,000 owners and operators who are responsible for nearly two million rental housing units throughout California. CAA has the goal of promoting fairness and equality in the rental of residential housing and aiding in the availability of high quality rental housing in California. CAA has advocated on behalf of rental housing providers in legislative, judicial and other forums in California and nationally.

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *Amicus curiae* discloses that counsel of record for all parties received notice *of amicus curiae's* intention to file this brief more than ten days prior to the due date, and counsel for all parties have consented to the filing of this *amicus* brief.

CAA submits this *amicus brief* to assist the Court in understanding the far-reaching public policy effects of government control of rents and the invalidity of rent control measures, such as the City of Goleta's Mobile Home Rent Control Ordinance (the "City's RCO"), as violative of substantive due process under this Court's decision in Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

Specifically, CAA is opposed to government control of rents and believes strongly that rent control is an ineffective and detrimental housing policy that is as damaging to renters as it is to rental property owners. In states like California, with its rapidly growing population, CAA contends rent control is particularly destructive because it discourages the construction of new housing, and investment in existing housing, at precisely the time it is needed most. While CAA is equally opposed to excessive rent increases, it firmly believes that the most effective way to ensure the existence of safe, affordable homes with stable rents is for government to recognize and harness market forces by establishing policies that encourage the construction of new housing and support investment in existing housing. Such measures, premised on sound economic and social policies, allow property owners to produce sufficient income to accommodate the

basic needs of residents and, encourage the production of new housing. Artificial restraints on rent imposed by rent control have the real and unfortunate effect of reducing both the quality and quantity of available affordable housing.

In light of this Court's decision in Lingle, it is of paramount importance to CAA and its members that this Court grant review and find rent control ordinances, such as the City's RCO, violate substantive due process because they are ineffective in substantially advancing legitimate state interests. This is especially true for mobile home rent control where, as here, it is undisputed that there is no mechanism for preventing mobile home owners from capturing the present value of the reduced rents as a premium on the sale of their mobile homes. Accordingly, CAA respectfully requests a grant of review by this Court.

SUMMARY OF ARGUMENT

Rent control measures were originally enacted to protect low income individuals and families by eliminating perceived windfall profits by landlords. The present day rent control debate, however, is much more complex than the tenant verses landlord competition. Decades of economic

and social havoc caused by rent control across the country demonstrate that such policies are not effective at promoting housing to low income populations and have actually worsened the affordable housing crisis. Rent control has shown to irrefutably decrease the quality and quantity of available affordable housing, increase high-priced shadow markets and provide a disproportionate benefit to high-income renters who hoard the price controlled units, among other negative results. As discussed herein, rent control policies in the current social, economic, and political environment are not effective in substantially advancing a government interest and, thus, are in violation of substantive due process under Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

In its decision, the Ninth Circuit Court of Appeals glossed over the constitutional viability of the City's RCO without addressing whether such rent control policies can survive a substantive due process challenge. As set forth herein, CAA respectfully urges this Court to grant the Petition for Writ of Certiorari in order to determine that rent control ordinances, such as the City's RCO, cannot pass muster as they violate the requirements of substantive due process under prevailing law.

ARGUMENT

I. This Court Must Address the Viability of the City's Rent Control Ordinance as to Substantive Due Process Claims in Light of Its Decision in Lingle v. Chevron U.S.A., Inc.

A. In Lingle, this Court Altered the Standard for Determining Whether Rent Control Violates Substantive Due Process Rights.

Prior to this Court's decision in Lingle, rent control ordinances survived substantive due process challenges if they were "*designed* to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and the purpose of the ordinances." Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468, 472 (9th Cir. 1994) ((internal citations omitted), *overruled by* WMX Techs. v. Miller, 104 F.3d 1133 (9th Cir. 1997) on other grounds, (emphasis in original)). The Ninth Circuit Court of Appeals in Carson Harbor continued to state "***[t]his deferential inquiry does not focus on the ultimate effectiveness of the law***, but on whether the enacting body could have rationally believed at

the time of enactment that the law would promote its objective." Carson Harbor, 37 F.3d at 472 (emphasis added).

Under Lingle, the applicable standard changed. The constitutionality of rent control ordinances shall be assessed on the ***effectiveness*** of the policy in substantially advancing a legitimate government purpose. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542 (2005) (emphasis added). Lingle concerned a Hawaii statute which limited the rent that oil companies may charge dealers leasing company-owned service stations. Lingle, 544 U.S. at 533. At issue before this Court was "whether the 'substantially advances' formula announced in *Agins* is an appropriate test for determining whether a regulation effects a *Fifth Amendment* taking." Lingle, 544 U.S. at 532 (emphasis in original). This Court concluded it was not. Id. at 545.

In concluding the regulation was not a taking, the Court opened the door for a substantive due process challenge. This Court performed an extensive analysis as to the development of the "substantially advances" formula, specifically finding that the formula "***prescribes an inquiry in the nature of a due process***, not a takings, test,

and that it has no proper place in our takings jurisprudence." Lingle, 544 U.S. at 540 (emphasis added). This Court reasoned:

> The "substantially advances" formula suggests a means-end test: It asks, in essence, **whether a regulation of private property is *effective*** in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that **fails to serve** any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the *Due Process Clause*.

Lingle, 544 U.S. at 542 (italicized emphasis in original, bold emphasis added).

By requiring an analysis of the effectiveness of a regulation, Lingle questions prior case law that focused solely on the rational relationship between a regulation and its intended purpose. In Pennell v. City of San Jose, 485 U.S. 1 (1988), this Court stated:

> The standard for determining whether a state price-control regulation is constitutional under the Due Process Clause is well established: "Price control is unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. . . . ."

Pennell, 485 U.S. at 11 (internal citations omitted). Under Pennell, the determination of whether a regulation was "arbitrary, discriminatory, or demonstrably irrelevant" rested entirely on whether the regulation had a "legitimate and rational goal." Id. at 13. It was on this questionable basis that the Ninth Circuit in the cause currently before the Court refused to address whether the City's RCO survived a substantive due process inquiry, reasoning:

> Whether the City of Goleta's economic theory for rent control is sound or not, and whether rent control will serve the purposes stated in the ordinance of protecting tenants from housing shortages and abusively high rents or will undermine those purposes, is not for us to decide. We are a court of law... and are bound by precedent

> establishing that such laws do have a rational basis.

Guggenheim v. City of Goleta, 2010 U.S. App. LEXIS 25981, at * 31 (9th Cir. 2010) (citing Pennell v. City of San Jose, 485 U.S. at 13).

B. The City's Rent Control Ordinance Deprives Land Owners of Property Rights Without Due Process of Law Because it is Ineffective in Substantially Advancing a Legitimate State Purpose, as Previously Determined by the Trial Court.

The Ninth Circuit's recent decision fails to apply the "effectiveness" standard for determining if a policy substantially advances a stated public purpose to survive a substantive due process claim, as provided for in Lingle. Unfortunately, the result of the current decision provides no guidance or precedent as to the constitutional viability of ineffective rent control policies that continue to burden California's property owners and renters alike.

Accordingly, and pursuant to the substantive due process test articulated in Lingle, this Court must find that the City's RCO is unconstitutional because it is ineffective in substantially advancing its stated pubic purpose of creating affordable housing, as was determined by the district court in this case. As Petitioners assert in their Petition for Writ of Certiorari ("Petition"), the "district court granted petitioners summary judgment on the takings claim, holding that the ordinance 'fails to substantially advance its stated purpose' of creating affordable housing..." Pet. App. 157a, 159a. The district court reasoned "that because the ordinance 'contain[ed] no mechanism for preventing mobile home owners from capturing the present value of the reduced rents as a premium on the sale of the mobile homes,' it did not meet the goal of ensuring low-cost housing." Pet. App. 156a-57a. Accordingly, this Court should find that the City's RCO violates substantive due process.

C. The Ninth Circuit Court of Appeals and Other California Courts Have Recognized the Impact of Lingle on Substantive Due Process Claims in the Context of Property Rights.

In recent years, an increasing number of

courts have cited to Lingle for the proposition that a substantive due process claim is no longer barred in the context of an allegation of a deprivation of rights in real property. See Action Apt. Ass'n v. Santa Monica Rent Control Opinion Bd., 509 F.3d 1020, 1026 (9th Cir. 2007) (stating substantive due process can be an appropriate vehicle to challenge the rationality of land use regulations); MHC Financing Ltd. Partnership v. City of San Rafael, 2006 U.S. Dist. LEXIS 89195, *26-27 (N.D. Cal. 2006) (finding "Lingle undercuts the Ninth Circuit's basis for barring substantive due process challenges to deprivations of property."); Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 855 (9th Cir. 2007) (stating "Lingle pulls the rug out from under our rationale for totally precluding substantive due process claims. . . ."); S. G. Borello & Sons, Inc. v. City of Hayward, 2006 U.S. Dist. LEXIS 86293, *11 (N.D. Calif. 2006) (recognizing "Lingle marked a path for substantive due process challenges").

As courts look to Lingle for authority that substantive due process is a proper claim for deprivation of property rights, they must also follow the standard set forth by this Court in Lingle that only an effective regulation is one that substantially advances a legitimate state purpose and meets the requirements of a substantive due process. This

theory has been embraced by several courts. In S. G. Borello & Sons, Inc. v. City of Hayward, the U.S. District Court for the Northern District of California recognized:

> [A]fter Lingle, there is no explicit text for assessing whether a regulation is ***effective*** in achieving a legitimate public purpose; only the due process clause remains.

S. G. Borello & Sons, Inc., 2006 U.S. Dist. LEXIS 86293, *10 (emphasis added). Soon after, the same court determined that, in applying Lingle, not only was a substantive due process challenge to deprivations of property appropriate, but "substantially advances" is the proper test for the analysis, finding ". . . 'the failure of the regulation to substantially advance any legitimate public purpose in violation of due process . . . would give rise to a cause of action for damages under 42 U.S.C. § 1983'." MHC Financing Ltd. Partnership v. City of San Rafael, 2006 U.S. Dist. LEXIS 89195, *26-27 (2006).

At issue in MHC Financing Ltd. Partnership was the Mobilehome Rent Control Ordinance of the City of San Rafael. MHC Financing, 2006 U.S. Dist.

Lexis 81895, * 1 2 (2006). The City of San Rafael moved for summary judgment on MHC's claims, including MHC's substantive due process challenge to the city's mobilehome rent control ordinance. Id. at *24-25. The City contended that MHC's substantive due process challenge fails because the "ordinance is rational as a matter of law... rent control is pervasive and legislative determinations about the ***efficacy*** of economic legislation cannot be second-guessed by the court" Id. at *27 (emphasis added). Relying on Lingle, the court denied the City of San Rafael's motion for summary judgment on the substantive due process claim, reasoning:

> That Lingle has shifted the judicial assessment of ***effectiveness*** from takings law to the realm of substantive due process does not erase the significance of repeated judicial skepticism of these premium-transfer rent control ordinances. To the contrary, the reasoning developed under the now defunct "substantially advances" formula plainly bears on MHC's due process challenge, as ***both doctrines, in essence, assess the relationship between the City's means and ends***.

Id. at *29 (emphasis added). The court continued:

> Affordable housing may be a reasonable end. But the City fails on the present record to persuade that the ordinance's one-time premium transfer ***as a means of achieving*** that end cannot be analyzed for rationality.

Id. at *29-30 (emphasis added) (also recognizing that "following others does not ensure a sensible path" since "to do so would insulate even the most arbitrary law from judicial review for the mere reason that two or more cities were obtuse enough to enact it"). This case presents this Court with the opportunity to adopt this sage analysis.

II. This Court's Decision as to the Constitutionality of Rent Control Could Impact Rental Properties and the Affordable Housing Market Throughout California.

As stated above, rent control has proven ineffective and counterproductive at creating and sustaining affordable housing for the country's neediest. The damaging economic and social effects of rent control are long-lasting and not confined to

only those communities that adopt them. In fact, rent control actually injures the very segment of the population that affordable housing laws are intended to protect.

Rent control is an artificial means of keeping housing prices low. As many economists will affirm, the short-term reduction in price is little reprieve over the long run as prices increase and supplies decrease. By artificially forcing rents below market level, landlords do not get a fair return on their investment. Not surprisingly, this causes property owners to finance more profitable investments and direct capital out of the rental market. As a result, needed improvements are not made to existing housing, rental housing is converted to other uses or simply abandoned, and new construction in the rental market dramatically declines. Studies show that from 1980 to 2000 (even after lowering rent control restrictions during the 1990's), total rental housing stock in Berkeley and Santa Monica fell by nearly seven and nine percents, respectively. The counties, on the other hand, showed extensive overall growth as Alameda increased over 18 percent and Los Angeles increased almost 16% over the

same twenty-year period.[3]

Rent controls discourage landlords from performing necessary repairs and maintenance to existing housing. This results in a deterioration of the quality of available affordable housing, possibly to the point where the controlled rent is actually the market rent. A study by the Rand Corporation of Los Angeles' rent control law found that 63 percent of the benefit to consumers of lowered rents was offset by a loss in available housing due to deterioration and other forms of disinvestment.[4]

Additionally, as the price of a few, controlled units are forcibly held down in the regulated markets, the costs for other rental housing in the surrounding unregulated areas is driven up above market levels. This results in the creation of shadow markets which offer higher-priced rental units to satisfy the demand for housing left unfulfilled by the regulated markets. In essence, because there are only a few available rent-

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[3] Rent Control Issues and Impacts, Sacramento Regional Research Institute, 2003, pg. 5.

[4] C.P. Rydell, et al., The Impact of Rent Control on the Los Angeles Housing Market. Report N-1747-LA (Santa Monica: The Rand Corporation, 1981).

controlled units, which are generally hoarded by middle- and upper-income tenants, everyone else is forced to find expensive housing in the shadow markets. Thus, the reality of rent control is that affordable housing is less accessible to low-income individuals and families, who are forced to live in uncontrolled apartments and pay above-market rents.

As suggested above, the costs of rent control disproportionately affect the low-income population. These costs include a significant reduction in the quality of existing rental housing or a substantial reduction in access to new affordable housing. In addition, rent control promotes immobility. It induces tenants to stay in the same unit for an excessive period of time, even if their situations and preferences change. In fact, tenants in rent-controlled units are often too reluctant to accept higher paying jobs in another city simply because they do no want to give up their controlled unit. Policies that promote such immobility among the labor force offer no benefit to California's communities and overall economic health.

The situations described above are only the tip of the iceberg when it comes to the damaging effects of rent control. It is largely undisputed that

over the last several decades rent control whether applied to multi-family housing or mobile home parks, is not effective at providing affordable housing to those that need it the most. CAA anticipates that in the aftermath of Lingle, courts across the nation will be forced to address due process challenges to rent control ordinances. Accordingly, CAA urges this Court to grant review on this issue and find that rent control regulations are not effective in substantially advancing any legitimate government interest, and therefore, no longer meet the requirements of substantive due process.

CONCLUSION

Rent control is an ineffective means of promoting affordable housing. Under Lingle v. Chevron U.S.A., Inc., government regulations that are ineffective at substantially advancing a legitimate government purpose violate substantive due process. This case provides the Court with an opportunity to instruct the Ninth Circuit to apply the effectiveness test articulated in Lingle in assessing the constitutionality of rent control. Due to the profoundly detrimental economic and social ramifications of rent control, this Court must find that rent control is ineffective at achieving its stated

purposes and, therefore, violative of substantive due process.

April 13, 2011

Respectfully Submitted,

/S/

STEPHEN D. PAHL
Counsel of Record
KAREN K. MCCAY
PAYAL D. MEHTA
PAHL & MCCAY
A PROFESSIONAL LAW
CORPORATION
225 W. SANTA CLARA, SUITE 1500
SAN JOSE, CALIFORNIA 95113
SPAHL@PAHL-MCCAY.COM
(408) 286-5100 (TELEPHONE)
(408) 286-5722 (FACSIMILE)

Counsel for Amicus Curiae
The California Apartment
Association